METHODS FOLLOWED IN GERMANY BY THE HISTORICAL SCHOOL OF LAW.[1]

I am well aware that methodology is not a popular subject. Practical people are especially impatient of the apparent waste of time involved in discussing how things should be done; for, as President Roosevelt has well said: "The doer is better than the critic." But it must be conceded that questions of method are not of theoretical interest only, but also of practical value. Conspicuously successful achievement is always preceded by the discovery of proper methods. American industrial methods are justly renowned throughout the world. American "Captains of Industry" intend to use always the best plan that has been devised, and if possible to find a better one, to shorten the time of production and to perfect the output.

A similar claim may be made as regards the German science of law. There was during the last century a continual agitation in the scientific literature. German jurists were busy in studying the methods by which law comes into existence, and the methods in which law should be studied and explained. There was a thorough examination and criticism of fundamental principles, particularly in the matter of methods.

It may, perhaps, be fancied that in the mental sphere such questions are less important than in the sphere of mechanics. Law is, indeed, no engine, but comprehension and explanation, whether of law or of an engine, are mental processes, and in every field of science the processes are fundamentally the same.

In the lectures which I am to have the honor of delivering before the students of Columbia University it will be my effort to indicate the different elements of which German law is composed, and to explain the tendencies of German law, particularly in the field of social reform. In the introductory address it seems to me profitable to speak briefly of the methods in which law should be studied and explained, in accordance with the newest and best plans of German science.

These methods cannot be understood without looking at their development.

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The author of this address wishes to acknowledge his indebtedness to Professor Munroe Smith, who kindly read the manuscript and suggested numerous improvements in its English style.

The history of juristic methodology cannot be passed over in silence, because in the last century astonishing revolutions have taken place in this branch of human intelligence. In this history we may distinguish three periods: First, the methods of the old natural-law doctrine; secondly, the methods of the earlier historical school; thirdly, the improvements made recently in the historical methods.

The old doctrine of natural law has not been totally displaced by the historical school. My former colleague in Marburg, Professor Bergbohm, now at Bonn, has shown this in his book, entitled *Jurisprudenz und Rechtsphilosophie*. Bergbohm thinks, with good reason, that the old school, which, according to the common opinion, died long ago, has not yet totally lost its vitality. Therefore, I must show in what the character of the old school of natural law consists, even at the risk of repeating things already well known to you from other lectures.

The school of natural law was one of the most important schools which ever existed. It assumed its latest form and exercised its most far-reaching influence in the great struggle for civil and political liberty which convulsed the world in the eighteenth century. This movement gave birth to the great French Revolution, and also to the independence of the United States. Both movements are linked together by the name of Lafayette.

From the same movement came also some of the most marked tendencies of Prussian legislation. Frederick II lived not only at the same time with Washington, but in the same circle of ideas. Karl Hillebrand has said:[2] "As a civil legislator he (Frederick) realised the dream of his age by putting natural law in the place of traditional law and custom. His code (the *Landrecht*) in many of its articles reads like the Rights of Man of the French Revolution and the American Constitution." When our Emperor William offered to the United States a statue of Frederick II it was not, in my opinion, the military achievements of his great predecessor which seemed to him to make the gift especially appropriate. It was rather for Frederick the law-giver that he wished to suggest a place in the city which perpetuated the name of the father of your country, to the end that the relation between American and Prussian *social ideals* in the eighteenth century might thereby be typified and commemorated.

Whatever we may think of the natural-law theory, the natural-

[2] German Thought from the Seven Years War to Goethe's Death, p. 56.

law movement deserves the greatest respect. It was one of the chief sources of modern civilization. It was a reaction of the people against the burdens of the past, which were lasting too long—a reaction against an inopportune conservatism. It arose like a thunderstorm, clearing the air in a moment of sultriness, sweeping away dark clouds, but destroying also many valuable creations of former times.

It is, indeed, easy to understand why the school of natural law enjoyed for a time such unquestioned supremacy, and why its principles live even now in the minds of an innumerable multitude of human beings. This school proclaims that "law depends on human nature, and must be judged by human nature." That is a doctrine which is very agreeable to everyone, because everyone has a human nature, and by virtue of this possession has, according to this doctrine, the right to be judge of every law. Our great poet Goethe in the prologue to his masterpiece, Faust, makes God Himself say to the Devil: *"Ein guter Mensch in seinem dunkeln Drange ist sich des rechten Weges wohl bewusst."* That is to say: A good man in his unclear impulses is well aware of the right way. That certainly refers only to moral questions, not to questions of law. As regards the law, it cannot be recognized generally that every good man understands it perfectly, and can be his own lawyer in all questions. That is conceivable only in the earliest types of civilization.

In a highly-developed system of human intercourse the simple, unlearned citizen does not know the law, either in Berlin or in New York. Law must be learned, and without patient study the best of men is incapable of knowing the law of his own country. That comes from the undeniable fact that law is the product of a slow development, dependent in no slight degree on the influence of political events. Therefore, a law, although it is not a mechanical engine, has a certain resemblance to an engine invented by clever men to attain a definite purpose, and later preserved by a people who have forgotten its origin and believe that it was a simple product of nature. Therefore, law cannot be regarded as a ***direct*** product of human nature, nor can any rule of law be explained by considering human nature in general, without knowledge of the historical conditions under which the rule came into existence. Consequently, nobody can judge a law who is ignorant of its special history. Without that, he cannot know the interests which the law was designed to subserve, nor determine

whether the protection of these interests has been rendered unnecessary or undesirable by later events.

Fearing an imitation of the exaggerations of the French Revolution, the historical school of law was created by Burke in England, and by Hugo and Savigny in Germany. But, unhappily, the wrong principles of the school of natural law could not be completely destroyed. From one point of view, indeed, it is impossible to reject the entire natural-law doctrine as a mere mass of mistakes, for it is certain that human nature is never without influence on the contents of law, because human nature is never without influence upon human history. When an existing law offends the feelings of the average rational and moral man, it may well be attacked and repealed as unnatural. But the fact that an unnatural law can exist, and exist as law, proves that human nature does not engender law directly. Nature may forbid certain laws, but it produces laws only by setting in motion a series of historical factors. It is not enough that people need a law, there must be a power moved by a desire to satisfy this need. In almost any given case different ways are open to come by a good law. The one way is frequently as good as the other. For instance, the new German social laws are not used by other nations. The adoption of these laws in Germany, and the non-adoption of similar laws in other countries, are largely due to political reasons; and human nature can be invoked with equal truth as the reason of their adoption and as the reason of their rejection. A good criticism of natural-law methods may be found in Falstaff's suggestion that certainly in many cases reasons are "as plenty as blackberries."

Those writers who found natural law in reason—that is, in their respective reasons—sold a very cheap ware, if they did not simply accept the results of a historical development. Equally cheap is the agitation of unlearned orators, who often appeal to the prejudices and excite the passions of their hearers. These are the prophets of the doctrine of natural law, and these prophets will never be extinct, because human audacity and human ignorance can never die out. But science can deliver us from this out-of-date doctrine, and from the influence of those who neither feel its shallowness nor see its perils. It must, unfortunately, be conceded that the deliverance is not complete. In the explanation of laws their history is often neglected, even in Germany. This must be regarded as a proof that the historical school has not completed its work. Indeed, the tenets of this latter school have

been often attacked, and as a result of these attacks some of its teachings have been refuted, while others have been improved.

That the principles of the historical school can be totally refuted is beyond my comprehension. If laws are to be explained, their development must be studied. He who denies this statement commits a deadly sin against veracity, which demands that every fact must be studied as a fact, not as a mere idea. But, although the fundamental principles of the historical school were sound, there have been developed within this school certain doctrines and certain tendencies which provoked a wholesome reaction. Of these I must name:

(1) Pure positivism; that is, the acceptance of everything which has come into the law in earlier times, without any criticism of its practical value for the present time.

(2) An unnatural separation of the German and Roman elements in modern law leading to a conflict between the so-called Germanists and Romanists.

(3) The overrating of old times in comparison with the history of the last centuries.

I must explain these three evils in order to warn the American people against imitating them. Even as our European vineyards must be protected against the importation of phylloxera, so American legal science must be protected against the outrageous mistakes of the historical school.

In the first place, because historical studies were cultivated in all the universities, a great number of students eagerly gathered heaps of historical facts and historical conjectures without any practical aim. The young lawyers became more and more historians and philologists. Less and less was jurisprudence considered as a practical science, or legal study as a preparation for the calling of barrister or judge. The vital connection between the systematic presentation of the law, the history of law, and the tendencies of legal practice, has often been forgotten. Jurisprudence tended to become an ancillary science, a servant of general history and philology, and, in the end, legal education lost sight of its practical purpose. This tendency was favored by our illustrious Theodore Mommsen, former professor of law in our faculty of Breslau, and later at Berlin, who was the greatest authority on Roman history. This method of study may be regarded now as dominant. I, myself, am doing homage to it in writing regularly the articles on Roman private law for Pauly's large Encyclopedia

of Classical Antiquity, and also in the interpretation of recently discovered papyri, and I hope to employ this method, whenever its employment is necessary, during my life. There must be such a connecting link between jurisprudence and philology.

But this cannot be the principal aim of legal science. Our first and most important purpose must be to train practical lawyers, to make our students capable of applying the results of the science to existing problems, either as advocates or magistrates. The neglect of the practical aims of jurisprudence, which I have just indicated, has aroused in large circles of practical lawyers a certain mistrust of our science. These lawyers think that we are too learned and not practical enough. I fear that also in America many lawyers may have said, upon hearing that I come to you as professor of Roman law: "God forbid that German doctrinairism should make its way into our country." But you may be sure that I am not a "*doctrinaire*" in the common acceptance of the word. I do not forget that our science must be a practical one, and I distinguish between what a teacher must study and what the pupils must learn. Therefore, you must not believe that I have come over to educate any law students as mere philologists or historiographers. By no means. I speak primarily to future American lawyers and in their interest.

Therefore I shall explain Justinian's institutions, not only as a work of past time, but as a general source of notions which we find in your American practice as well as in the German or French civil codes; for instance, possession, property, contracts. Therefore, I shall also explain the Roman Digest as a school of modern practice, developing its value for lawsuits such as may arise nowadays either in New York or in Berlin. And the social tendencies also of the German law can be made serviceable to special American interests.

Although in these lectures I mean to do homage to the science of history, I do not think that jurisprudence is the servant of history. I am preserved against this view by special events which happened while I was professor at the University of Marburg. There exists in Marburg a large "*Archiv*"—that is to say, a record office; and in connection therewith the famous historian Heinrich von Sybel established a special "*Institut*," or school for training keepers of records—men who should be competent to take charge of Prussian record offices. For the examination of such future officials a committee was appointed, and of this committee I was

made president, although I was not professor of history but of law. Sybel said to me: "I have chosen you, not in spite of your being a lawyer, but because you are a lawyer, for in a record office it is impossible to preserve all that has been written; the officials must take the trouble to reflect what papers should be burned, and what should be handed down to posterity. In many cases such a decision can only be made by a lawyer who has himself had experience as a judge." (I, myself, as Sybel knew, had been a judge in Berlin.) In the same sense not only the record office but the total science of history must be restricted to the important records. History is not a heap of facts, but an orderly arrangement of important facts. Only the knowledge of present life enables us to write history. Sybel, himself, laid great stress on the fact that he had been a pupil of the most renowned professor of jurisprudence of the time, Savigny.

This experience gave me a clearer view of the relations between history and law. Jurisprudence is, indeed, dependent upon historical science, but only partly dependent, and historical science is also dependent upon knowledge of law. The two sciences must always have a reciprocal influence upon each other. Unhappily, several of our law professors have not perceived that they were enslaved to historical specialties and were neglecting the practical aim of all juristic science.

It is, of course, true that science can never be a practical calling, because the pure knowledge of facts is a matter independent of practical aims. But the arrangement of scientific facts, and the selection of important facts out of the multitude of indifferent happenings, can be made in accordance with practical views. In all that I shall have to say at Columbia about Roman law and German law, and about those principles of law which are not merely Roman or German but universal, I shall strive to remember the practical aim of our calling.

The first aberration of the historical school, which we have just considered, was the subordination of law to history and philology. The second was the conflict between Romanistic and Germanistic lawyers—a conflict which arose from the separation of the Roman and German legal studies. I hope that you will never have such a struggle in America, for it destroyed in Germany for a time the unity of legal science, and obscured the understanding of the real German law, as it existed in daily life and was applied in the courts. It engendered needless conflicts between the servants of science,

who should have made common cause against the foes of every historical method.

Let me at first explain how this struggle arose. Savigny, who was the leader of the historical school in the beginning of the nineteenth century, was a Romanist. Such was his genius, and so great was his power of expression, that he surpassed all of his competitors and became the leading authority on jurisprudence in the first part of the nineteenth century. In spite of the successful struggle which he carried on against the natural-law school, he had not freed himself wholly from the mistakes of this school. It was well said by Bekker, our oldest living authority on Roman law, who celebrated in Heidelberg during this summer his eightieth birthday: "Unhappily, Savigny did not hear Savigny's lectures in his youth." Indeed, without the tradition of the natural-law school Savigny could not have believed, as he did, that the law of the Emperor Justinian, written in the sixth century, could be used in modern lawsuits without regard to the thirteen intervening centuries. In reality modern German law is not a law of Byzantium. It is a mixture of Roman elements and other elements, partly inherited by all German peoples from ancient times, and partly created in the last centuries. The German elements were never totally displaced by Roman ideas, but were blended with them into a new whole. New elements were added, and the resulting law is one which was never applied at Rome or in ancient Germany. The so-called reception of the foreign law was indeed a transubstantiation; a national creation of new ideas, as was also the case with the reception of Italian art. Therefore, the Germanists were right in protesting against a legal science which largely ignored the period between Justinian and the present day.

It is a good old saying: "*Natura non facit saltum*"—that is, nature does not make bounds. We may say with equal truth, *historia non facit saltum.* Neither nature nor history advances by leaps and bounds. The chain of natural and of historical causality is an unbroken chain. You cannot describe modern life as a consequence of the life of Justinian's time. Therefore, the protests of the Germanists were justified. But, unhappily, they made a similar mistake. They reconstructed with infinite patience the old German law as it existed when German ideas were not yet sensibly influenced by those of the Romans. That was a great scientific service; but in many instances they erred in seeking the explanation of the modern law in the old German law exclusively.

For instance, they explained modern possession by the old "*gewere*" or "*seizin*," an institution which was certainly no longer in existence in modern Germany and which was not recognized in the practice of the modern German courts. In the same way a very modern system of inheritance, which has been accepted in Germany, is regularly regarded as an old German system. In this way the Germanists violated the law of veracity, painting the evolution otherwise than as it really took place. If Savigny leaps from Justinian to the nineteenth century, they leaped from the twelfth century to the same goal. So were both Romanists and Germanists involved in the same damnation. Both of them neglected the results of the last centuries.

So arose an unnatural separation into two separate parts of the single body of the German law, which consisted of a blend or fusion of foreign, old German and modern ideas. Connected with this mistake was the overrating of the old times and the underrating of the intervening centuries between Roman and German antiquities and modern life. Especially was there an underrating of the great political events of the last centuries—events which engendered also entirely new ideas for the private law. The French Revolution is more important for the explanation of modern German private law than are the wars of Justinian and of Charlemagne. German science now avoids these mistakes without sacrificing the principle of historical evolution. It continues to explain later law from earlier law, but it no longer leaps over entire centuries.

The advances made in German legal science, and particularly in methods, have not consisted solely in correcting the mistakes of the older historical school. Under the influences of related and auxiliary sciences, other improvements have been introduced, and these I hope to indicate and to make use of in my later lectures.

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